No. 80-1134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC., *et al.*,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, *et al.*, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF IN OPPOSITION FOR UAW

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Can OSHA, consistent with its statutory authority, promulgate an occupational health regulation for a toxic substance which requires certain industries to make major engineering and work practice control changes?

2. Did OSHA's promulgation of a workplace health standard, pursuant to the notice and comment rulemaking requirement of the Occupational Safety and Health Act, deny due process to affected parties:

   (a) When it specifically used consultants to analyze an informal hearing record for possible evidentiary support for a given standard?

   (b) When it promulgated a standard which differed from the one proposed?

3. Can OSHA require employers to remove workers whose bodies are unnecessarily contaminated with a toxic substance to prevent further function deterioration, and simultaneously protect the economic status of workers who cannot lawfully oppose removal?

LIST OF PARTIES

The names of the petitioners and intervenors who sought review of the revised permanent standard for occupational exposure to lead, promulgated by the Occupational Safety and Health Administration at 43 FED. REG. 53067, are not correctly stated in Petitioners Brief at ii n.1. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, intervened below, in No. 79-1048 and consolidated cases, on the side of the Secretary of Labor.*

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* Some confusion has been engendered by the fact the United Steelworkers of America, AFL-CIO-CLC, who were petitioners in No. 79-1048 below, cross-intervened on the side of the Secretary in the cases consolidated with No. 79-1048. The Oil, Chemical and Atomic Workers International Union intervened as a petitioner after the cases were consolidated. The National Constructors Association also intervened as a respondent in the consolidated cases in response to the OCAW intervention to preserve the Secretary's decision not to regulate the construction industry.

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BRIEF IN OPPOSITION FOR UAW

OPINIONS BELOW

The opinions of the Court of Appeals are unofficially reported at 8 BNA OSHC 1810, and appear in the Appendix to the Lead Industries Association Petition (pages 1a to 286a—cited Pet. at —.)

COUNTERSTATEMENT OF THE CASE

Lead is a natural soft metal, mined from the earth's crust, smelted, widely distributed and used by a variety of manufacturing industries. In its inorganic form, lead

is also an ancient and well-known poison. Preamble, 43 FED. REG. 52952 col. 3.[1] The medical community has become increasingly concerned with effects of prolonged lead absorbtion throughout the Twentieth Century. Recognized public health organizations have reflected this concern by recommending ever lower levels of workplace exposure to lead.[2]

Medical science has identified a range of hazards passed by lead absorbtion into the blood stream and bone marrow. Classic, severe lead intoxication causes vomiting, stupor, irritability and convulsion leading to seizures, comas, heart attacks and death. (52954/2.) Less well known, lead absorbtion can cause impotence and sterility in men; and decreased fertility, and abnormal menstrual and ovarian cycles in women. (52954/2).[3]

In the process of investigating the health effects of lead, OSHA found that the body burden of lead should be kept below 50 ug/100 g[4] to provide a margin of safety against the adverse neurological effects of lead

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[1] Hereafter the preamble will be cited as "(52952/3)."

[2] Earlier in this century, airborne lead exposure was thought acceptable at levels of 500 micrograms per cubic meter of air. (500 ug/m^3). In 1933, the U.S. Public Health Service recommended an exposure goal of 150 ug/m^3 (52952/3). Although the newly created Occupational Safety and Health Administration adopted the national consensus standard of 200 ug/m^3 in 1971 as mandatory minimum, the National Institute for Occupational Safety and Health (NIOSH) recommended a 150 ug/m^3 permissible exposure limit (PEL) in 1973 (52953/1). NIOSH recommended lowering the PEL still further in 1975 (52953/1).

[3] OSHA identified four major categories of health effects: (a) Heme synthesis inhibition—decreased body capacity to carry oxygen in the blood (52955/1—52957/1); (b) neurological effects—degeneration of both the central and peripheral nervous systems (52957/1-52958/2) (c) renal system—kidney damage and failure (52958/2-52959/1); reproductive effects (52959/1-52960/3).

[4] 50 micrograms per liter of whole blood.

absorbtion; and below 40 ug/100 g to do the same for the heme synthesis, renal system and reproductive system problems which are associated with lead absorbtion.[5]

OSHA began its standard setting process on October 3, 1975, with a proposal for a new permanent lead standard which would, among other things, set the PEL at 100 ug/m^3. 40 FED. REG. 45934. Informal hearings on the proposed standard began in 1977, in Washington, D.C., and were later expanded to include hearings on April 26, 1977, in St. Louis, Missouri, and on May 3, 1977, in San Francisco, California. A special hearing was held, beginning November 1, 1977, on certain issues relating to medical removal protection. It was not until three years *after* the process had begun that OSHA promulgated the final standard at issue in this proceeding (52952/1). *See,* (53007/1), 29 C.F.R. § 1910.1025.

The key features of the final standard as promulgated are: (1) a PEL of 50 ug/m^3, which exposure is to be achieved through the use of engineering, work practice, and administrative controls; (2) extended implementation schedules for engineering controls; (3) interim use of respirators; (4) multiple physician review program; and (5) mandatory removals and consequent removal protection benefits program.

Nothing in this program was new to the world of occupational health regulation,[6] yet industry petitioners attacked the program as being far too strong, while the USWA and the OCAW attacked it as too weak. The

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[5] *See,* 52958/2; 52955/3; 52959/1; and 52960/3 respectively.

[6] *For example,* primary reliance on engineering controls was a key feature in the Coke Oven Standard, *see, American Iron & Steel Institute* v. *OSHA,* 577 F.2d 825 (3rd Cir. 1978); while a medical removal program and removal protection benefits were part of the Cotton Dust Standard, *see, AFL-CIO* v. *Marshall,* 617 F.2d 636 (D.C. Cir. 1979), *cert. granted* No. 79-1429 & 79-1583.

court below affirmed the standard as a whole, and for the major industries such as primary and secondary smelting, but remanded the issues of feasibility for certain specific industries[7] with directions to return in six (6) months. On January 21, 1981, OSHA published its feasibility findings for the remand industries, amending the standard to give the primary steel and automobile industries from three to seven years to comply with the final PEL. 46 FED. REG. 6134. These findings also have been submitted to the court below.

LIA's petition was filed prior to publication of OSHA's "Supplemental Statement of Reasons" for the remand industries.

SUMMARY OF ARGUMENT

The Courts of Appeals argue that OSHA has the authority to require industries to engage in large scale undertakings to improve the quality of the ambient air workers breathe. The Act empowers the Secretary of Labor to identify control technologies and require industry to choose among them. Any statutory issues, which are not settled, concerning the proper role of cost in industry standard setting will be resolved by this Court's review of *AFL-CIO* v. *Marshall*, 617 F.2d 636 (D.C. Cir. 1980), *cert. granted sub nom., American Textile Manufacturers Institute* v. *Marshall*, Nos. 79-1429, 79-1583.

The Act permits the Agency to engage consultants whose sole role is to review and analyze the sufficiency of the administrative record. The holding below, that and agency is not restricted in the use of consultants in the absence of express statutory limitations, is consistent with *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978).

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[7] Among the larger industries for which the court remanded the proceedings were automobile manufacturing, non-ferrous foundries, telecommunications.

The Circuits have also consistently allowed an agency to promulgate a final rule which is materially different from the one proposed if (i) all parties were advised of the proceedings in the original notice, and (ii) the matter subject to regulation was sufficiently disclosed for those participating to be able to comment. The application of these principles by the court below was accurate, and does not warrant this Court's review.

OSHA has the statutory authority to acquire transfer of workers away from high lead exposure areas in the workplace. OSHA's manner of implementing this authority with a maintenance of benefits requirement is consistent with the underlying purpose of the statute, *Whirlpool Corporation* v. *Marshall*, 445 U.S. 1 (1980). Further, the *mandatory* nature of removal is consistent with Congress' desire, as identified by this Court in *Whirlpool*, that employees should not have the risk-free right to *voluntarily* absent themselves from work.

ARGUMENT

I

The Court Below Has Not Expanded OSHA's Authority to Promulgate New Occupational Health Standards

In 1971, Congress granted OSHA broad authority to regulate workplace health and safety. Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* Congress specifically stated its purpose was

> to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . [29 U.S.C. § 651(b).]

The new permanent standard for occupational exposure to lead, 29 C.F.R. § 1910.1025, is a fine example of the Secretary's efforts to achieve that monumental goal.

The Act requires all toxic substance standards to be feasible, 29 U.S.C. § 655(b)(5). The Secretary analyzed the issue of feasibility, within the meaning of the Act, by applying the distinctions between technological and economic feasibility inherent in the statute and well developed by the Circuits by the time the standard was promulgated. *E.g.*, *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974); *Society of Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301 (2nd Cir.), *cert. denied*, 421 U.S. 992 (1975); and *American Iron Steel Institute* v. *OSHA*, 577 F.2d 825 (3rd Cir. 1978).

In analyzing technological feasibility, OSHA concluded:

> that rigorous and innovative application of known conventional technologies for isolating workers from the sources of exposure to toxic substances will, in almost all cases, enable employers to comply with the standard. . . . In some cases . . . reliance on new technology. [(52978/1).]

The lower court concluded that this decision was based on substantial evidence for the "major industries" and some others, but remanded for a fuller discussion of feasibility as to certain others. Pet. 246a-247a.

It was Mr. Justice Clark, sitting by designation, who first emphasized that in applying this Act:

> The Secretary is not restricted by the status quo. He may raise standards which require improvements in existing technologies or which require the development of new technology, . . [*SPI* v. *OSHA*, 509 F.2d at 13091.]

Later decisions complimented the Second Circuit's view that OSHA was a "technology forcing" statute; *e.g.*, *AFL-CIO* v. *Brennan*, 530 F.2d 109, 121 (3rd Cir. 1975).

The court below agreed with this assessment of the statute, and did nothing more than add flesh to the doc-

trine in the context of a standard which deliberately gave certain industry quite extensive periods of time in which to comply with the new PEL. *See*, Table I, 29 C.F.R. § 1910.1025.[8]

The technological feasibility issues do not, therefore, present this Court with the need to resolve any important or disputed questions. Further, consideration of the Supplemental Statement of Reasons, 46 FED. REG. 6134, may, to the extent it is deemed necessary by this Court, eliminate all doubt as to the lower court's view of technological feasibility.

Similarly, this Court can stay its hand with regard to the economic feasibility and cost-benefit issues. First, this Court's decision in *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. ——, 100 S. Ct. 2044 (1980), does not employ such a requirement. To the contrary, it implies the "reasonably necessary" language found in 29 U.S.C. § 652(8) is satisfied with a finding of "significant risk." Although there is a clear split among the Circuits on the need for a cost-benefit analysis by the Secretary as part of his rulemaking,[9] this Court has already heard argument in a case which should be dispositive of *all* OSHA cost issues. *American Textile Manufacturers Institute* v. *Marshall*, Nos. 79-1429, 79-1583.

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[8] Fundamentally, petitioners object to holding by the court of appeals that OSHA may make findings about what they (industry) can or will do. Pet. at 10-11. Yet, in the absence of immediately usable technology, the Secretary either must be able to make such findings or must give up the business of controlling exposure and relegate himself to regulating unavoidable effects of exposure.

[9] *Compare, AFL-CIO* v. *Marshall*, 617 F.2d 636 (D.C. Cir. 1979), *cert. granted sub nom., American Textile Manufacturers Institute* v. *Marshall*, No. 79-1429, 79-1583, holding no cost-benefit analysis required with *American Petroleum Institute* v. *OSHA*, 581 F.2d 493 (5th Cir. 1979), *aff'd* on other grounds 445 U.S. ——, 100 S. Ct. 2844 (1980).

II

OSHA's Reliance on Outside Consultants Was Appropriate and Lawful

Petitioners assert OSHA engaged in impermissible *ex parte* contacts after the record was closed. Pet. at 23. However, petitioners can point to nothing in the Act or the Secretary's regulations which make *ex parte* contacts unlawful. In the absence of statutory requirements, an agency need not volunteer more "due process" than its regulations require. *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council*, 435 U.S. 519, 546 (1978).

The Act sets up a structure for informal rulemaking, not adjudication. 29 U.S.C. § 655(b). The structure has been classified as "hybrid" because, on one hand, OSHA regularly uses hearing officers to compile a transcript but, on the other hand, also responds to more traditional forms of notice and comment. *IUD* v. *Hodgson*, 499 F.2d at 472-473. The Act also specifically empowers the Secretary to employ "experts and consultants" to aid the fulfillment of his responsibilities. 29 U.S.C. § 656(c)(2). As the appeals court recognized, such Act does not require a separation of functions, that the Secretary could not use consultants to analyze the record and provide a coherent rationale for his decision. Pet. 41a-43a. The APA, to the extent it is applicable, also does not require such a separation in a non-adjudication context. *International Telephone & Telegraph Corp.* v. *Local 134, International Brotherhood of Electrical Workers*, 419 U.S. 428 (1975).

There is no reason for this Court to involve itself in the factual determination of the role of consultants, since the court below applied the correct principles.

There is likewise little reason for this Court to rehash the settled principle that an agency may legitimately

promulgate a rule which differs from that which was originally proposed; *e.g.*, *GAF Corp.* v. *OSHRC*, 561 F.2d 913 (D.C.Cir. 1977); *South Terminal Corp.* v. *EPA*, 504 F.2d 646 (1st Cir. 1974); *American Iron & Steel Institute* v. *EPA*, 568 F.2d 284 (3rd Cir. 1977); *Chrysler Corp.* v. *Dept. of Transportation*, 515 F.2d 1051 (6th Cir. 1975). As recognized by the lower court, the key factors are whether the relevant parties were advised of the proceedings, *American Iron & Steel Institute* v. *EPA*, 568 F.2d at 293, and whether the subject matter to be regulated was sufficiently disclosed to forewarn of the kinds of comments which would be relevant.[10] Pet. at 47a-48a.

The holding below is an application of settled principle to specific facts. As such, it does not present this Court with an important federal question.[11]

III

Medical Removal Protection Benefits are a Lawful Innovation

The Court of Appeals characterized the medical removal protection program as "the true center of the controversy." Pet. at 67a. *See*, 29 C.F.R. § 1910.1025 (k)(2). OSHA promulgated the removal program because (a) the PEL provided "little margin for safety,"

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[10] The Act only required OSHA to publish a proposed rule in the FEDERAL REGISTER, 29 U.S.C. § 655(b)(2), but 5 U.S.C. § 553(b)(3) also requires notice of the terms, substance, or issues involved.

[11] The proposed PEL was 100 ug/m^3 while the final PEL was 50 ug/m^3. The difference reflects the "margin of safety" issue of which all parties were formally advised. 40 FED. REG. 45934/1-2. The parties were also advised the question of "sub-clinical effects" as distinguished from clinical lead poisoning effects might necessitate a different permissible exposure limit in the final standard. 40 FED. REG. 45955/1.

It is this kind of broad advance warning which petitioners unfairly characterize as "notice by ambush." Pet. at 22.

and because (b) removal is necessary to bolster the inevitable shortcomings of interim respiratory protection. (52972/3-52973/1.) Noting that "temporary medical removals depend on voluntary and *meaningful* worker participation" in a surveillance program (52973/1), OSHA provided a benefit protection mechanism to ensure that economic fear would not undermine the health program and to ensure the proper allocation of cost (52973/1-3).

The Court of Appeals correctly reasoned OSHA had the authority to promulgate such a standard for high lead exposure because the Secretary has specific statutory authority to develop "innovative" approaches to health issues, 29 U.S.C. § 651(b)(5), to prescribe "suitable" hazard control procedures, 29 U.S.C. § 655(b)(7), and his broad grant of power to promulgate "necessary" rules and regulations to carry out his responsibilities. 29 U.S.C. § 657(g)(2). Pet. at 68a-69a.

The court's reasoning also is consistent with last term's decision in *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980). In two crucial respects, the Secretary's reasons for implementing the program rationally further the Acts purpose of assuring safe and healthful working conditions. The standard requires workers to be removed whose health may be seriously threatened by continued exposure at existing levels. It also provides employers an incentive to clean up the air which is *independent* of the citation and penalty procedures. 29 U.S.C. § 659-660.

Equally important, the rule does not implicate Congress' concern that workers should not have a risk-free *option* to refuse hazardous work. *Whirlpool* v. *Marshall, supra.* In these circumstances, a worker's absence is not caused by any affirmative act on his or her part. Rather the agency has *ordered* the employer to remove the worker by regulation.[12] Neither the worker nor the

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[12] Interestingly, LIA does not challenge OSHA's ability to require removal in the first instance.

employer has any choice, except to the extent a worker decides to cooperate with the medical surveillance program. There is, therefore, no reason for this Court to review the decision.

CONCLUSION

For the foregoing reasons, the Court should *deny* the Petition for Writ of *Certiorari.*

Respectfully submitted,

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